UNITED STATES

# CIRCUIT COURT

OF APPEALS

FOR THE NINTH CIRCUIT

PUGET SOUND NAVIGATION COMPANY, a Corporation,
*Plaintiff in Error,*

*vs.*

MARY R. LAVENDAR, CHARLES STANLEY and SAMUEL BARLO,
*Defendants in Error.*

No. [illegible]

## Brief of Defendant in Error,

MARY R. LAVENDAR.

BYERS & BYERS,
*Attorneys for Defendant in Error.*

SEATTLE, WASHINGTON.

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# Brief of Defendant in Error,

## MARY R. LAVENDAR.

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We shall attempt to answer the brief of counsel for plaintiff in error by taking it up seriatim in the same divisions in which he has made it.

### STATEMENT.

The statement of the case by the counsel for plaintiff in error is correct as far as the facts are stated therein, though his statement is composed somewhat of argument.

The second allegation of the complaint is "that the defendant Puget Sound Navigation Company is the owner and operator of a certain steamer called the Lydia Thompson being run and operated upon the waters of Puget Sound." The fifth allegation of the complaint (p. 10 of Trans.) states the specific acts of negligence upon which the defendant in error relied for recovery, and we cite the Court to page ten of the transcript for those allegations. No proof was offered with regard to the second allegation of the complaint for the reason that the said allegation is *admitted;* nor was any motion or attention directed to it during the trial or at its close, nor until the motion for a new trial.

## INTERROGATORIES PROPOUNDED TO THE JURY.

Counsel for plaintiff in error has correctly stated the interrogatories and the answers thereto but his deductions therefrom are quite as imaginative as any testimony to which he allludes could possibly be.

The jury found that the proximate cause of the death of the said R. O. Lavender was the defective port and that the ship was not properly manned. It was neither the province of Stanley or Barlow to construct the vessel nor to engage the crew for the same, and the jury probably concluded that there was not sufficient evidence to

show that Stanley and Barlow did not exercise sufficient diligence with the personnel and equipment at their command, and the negligence was the fault not of either of these individuals but the fault of the Company, which is the plaintiff in error. It seems to be this mistake of counsel in conceiving the intent of the complaint that has led him astray during the trial of the case and in the preparation of the brief herein.

## SPECIFICATIONS OF ERRORS.

1. Counsel has cited errors of the trial court in the admission of testimony. Mary R. Lavender was the wife of R. O. Lavender and testified as to the earning capacity of her husband. It would seem needless to argue to this Court that a wife who has lived for thirty years with her husband is a competent witness as to his earning capacity or that she had a right to state the facts from which the jury might arrive at a basis upon which they could fairly estimate his pecuniary worth to her. The very interrogatories and answers propounded to this witness have been so often passed upon by appellate courts and the law thereupon is so well settled, that extended argument is useless.

2. Though, of course, all facts alleged by the complaint and denied by the answers were in issue, but there were certain facts in regard to the case that were not

contested and only slight proof was necessary upon such facts as these. There was no contest as to whether or not R. O. Lavender had met his death, and the allusion under specification of error two was not (Trans., p. 46) for the purpose of proving his death, as that was abundantly proven by other testimony, but to ascertain the state of his health and fix the time with relation to the time of his death. And, as above stated, as his death was proven by other witnesses, facts and circumstances, even if the testimony was wrongfully admitted it would undoubtedly be harmless error.

3. As to specification of Error Three: The ruling of the court was so undoubtedly correct that nothing need be said in regard to this.

4. As appears at various points in the transcript and testimony, the lower portion of the port or, as counsel for plaintiff in error has termed it, "a part of the bulwark of the vessel" was clamped in by means of irons extending through the side of the vessel and which turned down so as to embrace the port and fastened with a screw. As far as this is concerned, the testimony shows that the putting back of the port could make absolutely no difference to the remainder of the appliances. If the appliance was there it would not be removed by the port going out or be re-placed by the port going back, and if it had to be fastened with a rope, as witness testified, when the port

was re-placed, about twenty minutes later than when it went out, it certainly is admissible testimony tending to show that the clamp or iron fastening was not there when the port went out.

5. As specification No. Five is merely a continuation of Four, the same remarks apply to it.

6. In regard to specification of error Six, when the witness first went down, which was at the time of the accident, the port was out, the iron was not there, but the iron was in place on the other side of the port and when the port was returned, evidently for the reason that no iron was in place, they fastened one end of the port in with a rope. Evidence could hardly be more directly bearing upon the point than these statements of the witness.

7. As counsel has not predicated any argument upon this specification, we will not take up the Court's time with it.

8. It *may* require an expert witness to tell a jury that two ordinary doors, hinged so as to break in the middle and swing outward, and to start the opening of these doors, it is necessary to go to the middle of the same, which is also the middle of the port, and push against them, but we do not believe that this Court will think that it requires, in making such description to a

jury, any expert on a question of seamanship, and even if there was any expert knowledge necessary upon it, the captain of the boat (page 136) testified to substantially the same thing that they "just shove them out a little, then pull the rope to fetch them aside, open and shove them out a little," as the captain put it, it was necessary to go in front of this unfastened and insecure "part of the bulwark of the vessel."

9. If deceased did do as he was directed to do and the port was unfastened, as the testimony shows it was unfastened when he pushed out the upper doors, he would necessarily fail to be sustained by this "bulwark of the vessel" and would be precipitated into the water.

10. In this very specification of error, the counsel shows that the Court absolutely instructed the jury to disregard the hearsay testimony, calling the particular attention of the jury at the time to this specific testimony and then in a general instruction reiterated it by telling the jury that the court "Does not mean for you to infer that hearsay reports testified to by witnesses on the stand are to take the place of legal evidence." A witness who details to the jury a fact as a fact, which he knows only because another person not under oath has told it to him, does not give competent legal evidence. And the Court (Transcript, page 178) further amplified and made absolutely certain its instructions upon this point; but as a

matter of fact it being all one continuous transaction, we do maintain that the instructions of this Court upon this point and the ruling upon this point were more favorable to the plaintiff in error than it had a right to have.

11. Specification of error Eleven is as a matter of fact a part and parcel of specification Ten.

12. Specification of error Twelve is only another instance of counsel's attitude toward any adverse testimony, as it was clearly competent and clearly admissible as a part of the res gestae.

13 and 14. Specifications of error Thirteen and Fourteen have been hereinabove alluded to in calling attention to other specifications of error.

15. Specification of error Fifteen is so manifestly without any merit that we decline to take the time of the Court in discussing it.

16. Error of the Court in denying the motion of the plaintiff in error for a non-suit and instructed verdict at the close of the plaintiff's evidence and at the close of all the evidence might be worthy of discussion if it were not for the fact that even if all the evidence objected to by plaintiff in error was inadmissible, there was still sufficient evidence to go to the jury and to support the verdict. The testimony unobjected to shows that Mr. Lav-

ender was an employee of the defendant; that he went upon the boat and this was his first trip as such employee; that he was a man of good health, a good husband and father. It was admitted that he was earning at the time of his death fifty dollars per month. In Transcript, page 42, is set forth the entire crew of the "Lydia Thompson." The evidence also discloses, by plaintiff's exhibit "A," that the crew required by law to be on the "Lydia Thompson" and that the ship had not a full or sufficient crew, according to the requirements of the law, is uncontradicted. That the law is that a watchman should be employed upon this boat between the hours of sunrise and sunset and during this time should perform no other duty and that such watchman was not employed is not disputed. That there was nothing to fasten the port on one side of the same is so well established by the evidence that it is proven not only by the preponderance of the evidence but beyond any reasonable doubt. It was testified to positively and repeatedly by witnesses for defendant in error that such fastening was missing, and if the fastening was not missing, it appears from the testimony of Capt. Barlo and is admitted by counsel in his brief and in his argument that this was a "part of the bulwark of the vessel" and no way was accounted for it getting out excepting for the fact that the fastening was missing as testified positively by the witness above mentioned and

it and the deceased were precipitated into the water together. We submit that this evidence which is practically undisputed is sufficient to justify the verdict.

17. In support of specification of error 17, plaintiff in error urges that there was no evidence in the case of the allegation in the pleadings that the plaintiff in error was at the time that R. O. Lavender was alleged to have met his death either the owner or operator of the steamer "Lydia Thompson." It would seem that no evidence is necessary as the second allegation of the complaint is not denied, and under the rules of pleading, at least as they prevail in the State of Washington, in which jurisdiction this case was tried, such failure to deny is deemed to be an admission of the allegation. There was no direct evidence of the death of R. O. Lavender, but there was evidence that he was in the water twenty minutes while being searched for; that he called to the passengers and crew from the water; that the search was continued until all hope was given up and he was seen to sink into the water before the end of that search. It does not require expert testimony to convince either a jury or this Court that such conditions would result in death.

## ARGUMENT.

Counsel for plaintiff in error seems to be making his argument to a limited extent upon the assumption that

Courts are intended fully as much to pass upon nice questions of rhetoric or literature as to administer justice. The allegation in the complaint says "That the Puget Sound Navigation Company is the owner and operator of a certain steamer called the 'Lydia Thompson' being run and operated upon the waters of Puget Sound." What does it mean? Does the counsel or Court not know that such allegation refers to the owner and operator of a certain steamer when, as the fifth allegation says, on the third day of November, R. O. Lavender was employed? Does it not refer directly to the third day of November? It is true that a motion to make more definite and certain might probably have been granted, but a different rule of law applies and a complaint is entitled to much more favorable consideration when no exception is taken to the complaint either by motion or demurrer until after the judgment is rendered.

In *Chamber vs. Hoover,* 3 Wash. Ter. 107, Chief Justice Turner says:

> "He (the pleader) may be required on motion to conform his statement to the rules of good pleading and if he refuses, be turned out of Court; but as against a demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts and even inferences from averments amounting to mere conclusions of law will be considered in his favor."

And as this is the rule upon demurrer there is much more reason for it after the completion of the evidence or after judgment. The case cited by the counsel, *Barton vs. Brown,* is not at all in point. That case sustained exceptions to a libel. It would be parallel if the Court had granted a motion to make the second allegation of the complaint more definite and certain and defendant in error had taken an appeal, but the point, as abundant authorities will show will not avail the plaintiff in error in this case at the time he unfairly seeks to take advantage of it. Indeed the case cited by plaintiff in error, *Texas and T. R. R. Co. vs. Barrett,* in which a judgment for damages is affirmed by the United States Supreme Court has the identical allegation. The complaint averred he *is* a resident of said Tarrant county and defendant *is* a railway corporation, duly incorporated.

*Brooks vs. McCabe,* 39 Wash. 62.

*Prescott vs. Puget Sound Bridge Co.,* 31 Wash. 177.

Elliott Appellate Procedure, Sec. 471-474.

(B) 1. We can conceive of no good reason why Mrs. Lavender should not be allowed to testify to the earning capacity of R. O. Lavender, her husband. She testified that he had earned $1,500 during the prior year and it would amount to more the following year. He had

Loewer v. Harris, 6 C.C.A. 394;
Stanley v. Whipple, 22 Fed. Cas. 1046;
Peterson v. Hornblower, 33 Cal. 266.

a contract with the same parties at the same regular salary and his percentage was higher. The employment which he had taken with the plaintiff in error was merely temporary as between seasons work, and even if he was only earning fifty dollars per month there is abundant evidence to justify a verdict for the full amount of damages as rendered or claimed.

2. Counsel complains because this witness also testified to the death of her husband. As we have before stated, there were certain matters in this case at issue that were not contested matters. There was no question about the death of Mr. Lavender and very slight evidence was enough to go to the jury, as his death was conceded upon all sides; but Mrs. Lavender's testimony with regard to his death was simply fixing his pecuniary value at that time and show his expectancy of life, and no prejudicial error could possibly have occurred to plaintiff in error even if the testimony was erroneous.

3. It does not at all injure the testimony of a witness to needlessly slander him, and this Court will perceive that the testimony of the witness Dahl is neither wild nor incoherent nor in any way prejudiced, but bears on all sides every evidence of absolute truth and fairness. He was a merchant of Bellingham; he was a passenger on the boat; he had absolutely no interest in the action; he told what he did, what was said and what he saw; and

our best reply to the statement that his story is either wild or incoherent is to ask this Court to peruse his testimony. It is a significant fact, however, that the defendant in error relies to substantiate her case upon the testimony of three passengers upon the boat. That although the law requires and doubtless the plaintiff in error had a complete list of the passengers, not a single one was called to contradict or vary these statements, although every employee of the boat, from captain to deck hand, was asked to detail his story.

4. Counsel is in error with regard to the testimony of Mr. Dahl concerning the port. On page 57 Mr. Dahl testifies as to the height of the port, giving a general description of it, but not referring in any way to it after it had been brought back on board the vessel. The fastenings were not a part of the port but were a part of the vessel. They did not or should not have come out with the port because they go through the permanent part of the bulwark and when turned over form a clamp to fasten the port. In the twenty minutes that elapsed, which is the limit assigned to the search for Mr. Lavender and at which time they were in the act of making a landing at Olga, no very serious change would be possible to have occurred in an iron clamp attached to a vessel's bulwark, but when the port was put back in order to fasten it, it was necessary to use a rope to tie it in (Transcript, page

57), a fact and circumstance showing conclusively that something had to be put on and attached to the port in place of the clamp which was attached to the vessel, and this is another point where counsel would seem to intimate that expert knowledge of seamanship is necessary. It might take an expert to be able to state to a jury that it would be impossible for a piece of iron with a bend on each end at right angles, if it was in good condition, to slip out of a hole in the side of the vessel; or to illustrate it, that a two-inch head of iron could not go through a one-inch auger hole. But we do not believe for any such proposition expert testimony either is or ought to be required.

5, 6 and 7. That an intelligent merchant ought to be allowed to state such fact to a jury, if it is pertinent to the issue and as it was at issue whether or not the alleged clamp or fastening for the port was there at the time of the accident. The circumstance of a rope being put over to fasten the port instead of a clamp like to one on the other end is certainly a circumstance going to show that the clamp was missing.

8. We do not well comprehend how it could be very prejudicial error to the right of the plaintiff in error to allow Mr. Hohl, who was not a seafaring man, to state how the top doors of this port should be opened and how they, as a matter of fact, were opened, when he had ex-

amined them, especially in view of the fact that the captain of the boat, a witness for plaintiff in error, fully substantiated (Transcript, page 136) the statements of Mr. Hohl. Counsel probably inadvertently misstates the purport of the vidence of the fireman where he says "That he had seen him, meaning the deceased, kick the *lower* port." The fireman said no such thing. The fireman said, "I saw him kicking the port with his foot." He expressly says that he could not say which it was (Transcript, page 139), the lower or the upper port "as it was none of his business to look after the ports anyway, and he paid no attention," and for one to kick the lower port in an attempt to open it and especially an experienced seaman as was Mr. Lavender would be unlikely indeed. But the fireman's story substantiates the witness for the defendant in error to the effect that as the top doors were opened the lower port and Mr. Lavender were both precipitated into the water. He says, "I saw him kick the port with his foot, and I paid no attention to it and I turned around to keep the watch of the water glass on the steam gauge, and maybe half a minute after that I heard the splash in the water and a holler like and I turns around then and looks so that I would make no false alarm. I looked and the bottom of the port was gone, and I hollered to Mr. Granger that the watchman was overboard." Which port? "The port side port." Was it the lower or the

upper port? "I could not say which it was. It was none of my business to look after the ports anyway, and I did not pay much attention."

9. Counsel for plaintiff in error seems to be once more laboring under the delusion that it requires an expert seaman to tell how two doors hinged at the side and opening in the middle outward would be opened. If there is any radical difference between these and two doors on a barn or any two doors with which almost everyone is familiar, or how it can be that doors on a port require an expert seaman to describe or how hinges and doors act differently upon a boat from what they would in any other location it is somewhat inexplicable, and unless doors possess peculiar properties when they are carried from the land to the sea and the functions of hinges are changed, it would seem that a reasonably intelligent merchant ought to be able to tell something about them when he has examined them and that Mr. Hohl was not guilty of any excessive egotism when he essayed to do so.

10. We do not think that the witness criticised under this sub-section is much more to be criticised than counsel for the plaintiff in error. Counsel states that the witness said that he was asleep when the accident occurred. This is not stating the facts accurately. It is true that he was asleep when Mr. Lavender fell overboard, but he was almost immediately out on deck and

witnessed a large part of the things done at the time of the accident and, as has before been alluded to, the evidence that he gave that was hearsay evidence was taken care of by the Court by absolute instructions to the jury to disregard it. And counsel further is mistaken when he says that the Court did not instruct the jury to disregard this evidence (Transcript, pages 177 and 178).

11. We admit that certain testimony that Mr. Grover was somewhat intoxicated was not contradicted by any oral evidence. In fact we were unaware that it was an issue in this case. The jury had an opportunity to observe the witness upon the stand as he gave his evidence, and if what he told was true we cannot conceive how it matters what was the stage of his intoxication when he observed it. It might have been well, however, to follow President Lincoln's advice and send the crew of this boat some of that same kind of liquor. The weight of the testimony shows that Mr. Grover first gave the alarm and took an active part in attempting to rescue the deceased. He cut away a life belt and rushed with it to the back of the boat to throw it to Mr. Lavender, if he should be able to see him and be able to get it to him in the water. It was Mr. Grover's knife that cut away the lashings to the davits to enable the small boat to be put into the water. It was Mr. Grover who called to the drowning man, telling him to cheer up, and by this means locating

him and enabling the crew to better ascertain the whereabouts of the man they sought to rescue. It was Mr. Grover who told them where the man was as he floated past the vessel. His statement was substantiated by others; his actions were those of a man in full possession of his faculties, and an attempt to slur his testimony by saying that he was drunk is neither novel or ingenuous. It did not merit any contradiction. It is the character of testimony and not the character of the witness that a jury is called upon to weigh, and it was not a question of what was "thought" by anyone at the time of the transaction, but it was a question of what was *done* and *said*.

12. We do not wish to comment upon this portion of counsel's argument further than we have heretofore in alluding to the fact that the witness Grover was presumably enough of an expert to tell how doors could be opened, and in this particular would have to be opened from his knowledge obtained by an examination, as to where the hinges and openings of the doors were located. It would certainly not require an expert to state that one desiring to open those doors could not stand on the outside and open them. Perhaps it might require an expert seaman to testify to this, but we scarcely think that this Court would so rule.

(C) It is true that R. O. Lavender was a shipmaster and an able seaman. It was true that he was instructed

to go on the deck below and open the port (not the two upper divisions) and prepare for a landing at Olga (Transcript, page 51). It is true that the lower half of this port opening consisted of a heavy gate let into the side of the steamer so as to practically form a part of the bulwark. It is true that he went below and was only seen after that time by the fireman John Dougal, except for the other witnesses who saw him in the water, but there is certainly convincing evidence that he was in the water and that he was drowned on the night in question. That he should have deliberately kicked the port out is not very consistent with counsel's statements that it was a massive gate let into the side of the steamer so as to practically form a part of the bulwarks. That he deliberately jumped overboard is not to be presumed. That he did get in is beyond all question. *When* he went to release the upper doors, if the lower port was not fastened, it would be almost impossible for him to keep from falling in is beyond any doubt. If the port had been fastened so as to become a part of the vessel, it certainly would have remained in its position. That the forward clasp was broken or misplaced, as was stated by the witnesses, is very consistent with the fact that the port went into the water. That he was directed only to open the upper doors, as counsel for plaintiff in error states, is consistent with the fact that he did his duty, and if he did

he could not have fallen out without deliberately jumping overboard if the lower port had not been defective. The fact of defective construction of the vessel by which he was precipitated into the water is almost conclusive. The fact that the vessel was insufficiently manned is practically admitted, as the statement by the captain of the personnel of the crew does not tally with the requirements of her inspection, and we think that this case complies in every respect with the requirements of *Texas and P. R. Co. vs. Barrett,* 166 U. S., cited by counsel, that the "evidence showed not that the employer may have been guilty of negligence, but it pointed conclusively to the fact that he was," and while it may probably be true that there are differences as to minor details in the way in which the deceased lost his life, there is none of them which is not attributable to the negligence of the plaintiff in error. The deceased did not have a safe place to work. Was it not negligence on the part of the employer not to have a safe gate or bulwark to his vessel, especially when he was employing an ex-shipmaster who knew the parts of the vessel, knew what should be safe and what should not and whose very skill and experience would lend him confidence? Any employee had a right to assume that "a massive gate let into the side of the ship so as to form a part of the bulwark of the vessel" was safe, but a man of his experience would be more likely to trust to its

safety than one of no experience. His knowledge of seamanship would not aid where the negligence was so glaring as in the case at bar; it had the opposite tendency. Counsel admits that the employer is bound to furnish a safe place, but that at this place where the deceased was required to work was without fastening, and at least this is the testimony of defendant in error's witness, it has not complied with the law as laid down by counsel. In the case cited by counsel the Supreme Court says: "No one can say from the testimony how it happened that the step became loose." But counsel complains bitterly of the testimony of three disinterested passengers who state from their positive knowledge of an examination of the port how it did become loose, namely: that it had no fastener on one side of it. We are willing to abide by *Texas and P. R. R. Co. vs. Barrett* "in letter and in spirit." The Supreme Court of the State of Washington in *Sroufe vs. Moran,* 28 Wash. 402, has had to pass upon a case closely analogous to the case at bar and says, quoting with approval a former decision, *Adams vs. Montana & Seattle Ry. Co.,* 27 Wash. 507:

> "The respondent was not obligated to prove these facts by the direct evidence of eye witnesses nor by proofs which would leave them beyond the possibility of a doubt; it was sufficient if he established them by proof of circumstances which lead reasonably to their inference and which ordinarily satisfies an unprejudiced person."

The jury is supposed to have listened to the evidence and was instructed by the Court (Transcript, pages 172, 173) in substantially the language quoted by counsel on page 28 of his brief from the opinion of the Supreme Court of Washington in *Mitchell vs. The Tacoma Ry. & Motor Company.*

On page 29 of his brief, counsel says that the evidence in this case is uncontradicted; in fact is supported by the witnesses for both the plaintiff and defendant in error that R. O. Lavender was not instructed to touch this port. This is not exactly correct, but suppose he was not? What difference does it make? Could he get it out of its position with his foot if it was properly placed? And if it was properly placed, would it have gone into the water with him? But our theory of the case is simply that he did not try to remove the lower port, just as counsel says he was instructed, but when he unfastened the upper port the lower port must have gone into the water from the fact that there was nothing to hold it from so doing. Its support was gone. On page 29 counsel further states that the contention of the defendant in error that the "Lydia Thompson" was undermanned and the "finding of the jury to that fact is contradicted by the uncontradicted evidence in the case." We do not see why counsel made such a misstatement. There is no dispute to the evidence that Mr. Lavender was the watchman; there is no doubt

but that the law is that upon boats of this character he should perform no other duty than watchman between the hours of sunrise and sunset. If he was ordered and directed to perform another duty he had ceased to be a watchman and there was no watchman on board the vessel, but we are not confined to this. The perusal of plaintiff's exhibit "A," which discloses the crew that the vessel was legally required to carry at the time of the accident, with the testimony of Captain Barlo (Transcript, page 42), will disclose an incomplete crew at the time of the accident and there was no possible way for the jury to fail to arrive at their verdict that the vessel was not properly or sufficiently manned. But whether on account of inefficiency or incompleteness of the crew, and there was evidence as to both propositions, the jury has made that their finding and such finding is sufficient to support the judgment and a Court will not ordinarily disturb the finding of the jury, if it is even made from conflicting testimony, when there is evidence to sustain it. We take no exception either to the law as laid down in *Doremus vs. Root* or *Stevic vs. No. Pacific* or *New Orleans R. R. Co. vs. Jopes,* cited by counsel. It would seem on general principles that if a party who causes the injury shall be free from all civil and criminal liability of course his employer must be entitled to like immunity. But it is at least not admitted by counsel that either Stanley or Barlo

removed the clamp to the port or that either Stanley or Barlo were the employers of the boat's crew or that it was their fault that a man who had never been in a boat or trained in any such capacity was given to them as a portion of their crew or that their vessel was sent out without a complete equipment of officers and men. They may have done as well as they could with what they had, with such crew and appliances as they had at hand, but if the crew was inefficient or incomplete or if the appliances were defective or not properly constructed, it is the master's negligence.

In conclusion the defendant in error would illustrate counsel's argument with a hypothetical case. Plaintiff is walking along a traveled sidewalk of a city street. He is afterward found dead in a deep hole underneath that sidewalk, which hole had been covered by a grating, but the support or fastener which sustained the grating was not in place and the grating was old and decayed and when replaced, after the accident, had to be tied up, we will say, with a rope. He was a sober, respectable citizen of good character and habits, and it was his first walk on that particular street. His death was the result of concussion. No one saw him fall and he was not found until some time afterwards. On this statement of facts is a finding that the fall through the hole caused his death and it was negligence of the city, based upon a tissue of

conjecture and imagination? It is true that he might have climbed to the top of a building falling to the street below, and into the hole. It is true that he might have been despondent and taken that method of committing suicide and deliberately broken his way through the grating and fell into the hole. It is true that he might have gotten into that hole in any one of a thousand different ways, but is it not proof that would reasonably lead to the inference and which ordinarily satisfies an unprejudiced mind that he accidentally fell into it while he was walking and was killed by the fall? Does it not require a vivid imagination to picture his death in any other way? Would any reasonable man when informed of this statement say that man might have been making a balloon ascention and was killed by a collapse? Is not the imagination that of counsel in place of the witness? We submit that it is and that plaintiff in error has had one fair trial and the judgment should be affirmed.

Respectfully submitted,

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ALPHEUS BYERS,
Attorneys for Defendant in Error.

CLAY ALLEN,
of Counsel for Defendant in Error.